VONNISSE

MAMA MIA! HERE WE GO AGAIN – ANOTHER INTERPRETATIONAL DILEMMA IN RESPECT OF "RECEIVED BY" AND "ACCRUED TO" FOR PURPOSES OF SECTION 1 OF THE INCOME TAX ACT 58 OF 1962

***ABC Proprietary Limited v CSARS* (ITC 24510 CPT) (17 April 2019)**

OPSOMMING

"Mama Mia! Here we go again" – nóg 'n uitleg lastigheid aangaande "ontvang deur" en "toegeval aan" vir doeleindes van artikel 1 van die Wet op Inkomstebelasting 58 van 1962

Die gebruik van geskenkbewyse kom algemeen in moderne handel voor. Die Wet op Verbruikersbeskerming 68 van 2008 skep verskeie verbruikersregte wat vêrreikende gevolge vir die algemene handel inhou. In *ABC Proprietary Limited v CSARS* was die hof genader ten einde te bepaal wanneer 'n bedrag aan die belastingpligtige toeval, indien sy geskenkbewyse aan 'n verbruiker verkoop. Die uitspraak bepaal dat artikels 63 en 65 van die Wet op Verbruikersbeskerming sodanige toevalling uitstel totdat die geskenkbewys vir goedere en dienste ingehandig word of tot wanneer die geskenkbewys verval. Die vonnisbespreking betoog dat artikels 63 en 65 van die Wet op Verbruikersbeskerming onuitvoerbaar is en dat die bepalings in die Wet nie die "ontvangste" en/of "toevalling" van die koopsom van die geskenkbewys uitstel totdat die geskenkbewys vir goedere of dienste ingehandig word of tot wanneer dit verval nie.

1 Introduction

In terms of the phrase "received by or accrued to" in the definition of "gross income" in section 1 of the Income Tax Act 58 of 1962 ("the Act") it is obvious that there must be either a receipt or an accrual for an amount, which is not of a capital nature, to be included in a taxpayer's gross income. Accordingly, in the absence of any special provision in the Act, where a taxpayer neither receives anything nor has anything accrued to her, no amount will be included in her gross income (see *CSARS v Cape Consumers (Pty) Ltd* 1999 4 SA 1213, 61 SATC 91).

For decades, South African courts battled with the interpretation of the concepts "received by" and "accrued to". As business models change, the issue of "received by" or "accrued to" has again raised its head in recent judgments (see *M v CSARS* (14005) [2017] ZATC 1 (30 May 2017)). In the recent case of *ABC Proprietary Limited Company v CSARS* (ITC 24510 CPT) (17 April 2019), the tax court battled with the application of the principles laid down in the wealth of jurisprudence on the issue of receipts and accruals to agreements for the sale of a gift card. In this case note, I examine the taxation of gift cards for income tax purposes with specific reference to when the proceeds of the sale of a gift

card is "received by" or "accrued to" the merchant for purposes of including the proceeds of the sale in the merchant's gross income.

2 Facts

ABC Proprietary Limited Company ("A") carries on a business as retailer in clothing and general merchandise. As part of its trade, A also sells gift cards to its customers, which are later redeemed for goods equal to the value stored or printed on the gift card. Since 2007, A has segregated the proceeds of the sale of gift cards by transferring the amounts to a separate bank account. Once the gift cards are redeemed or once they have expired, the amounts are transferred to A's business account. Despite the segregation, A included the proceeds of the sale of the gift cards in its gross income for the years of assessment 2007 to 2012. From the 2013 year of assessment, A did not include the proceeds of the sale of the gift cards in its gross income. A believed that it was obliged, in terms of sections 63 and 65 of the Consumer Protection Act 68 of 2008 ("CPA"), to hold amounts received from the sale of gift cards in trust on behalf of its customers, until the gift cards are redeemed for goods or until they have expired. Further, because the amounts were held in trust on behalf of A's customers, the amounts did not accrue to A for tax purposes. Here, it must be noted that the CPA took effect on 1 April 2011.

After conducting an audit, the Commissioner issued A with revised assessments for the 2013 year of assessment, in which the Commissioner included in A's gross income the amount constituting receipts from the sale of gift cards. A unsuccessfully objected to the revised assessments and appealed to the tax court.

3 Judgment

The essence of the appeal was to determine whether the funds received by A in exchange for the gift cards must be included in A's gross income as "received by" in accordance with the definition of gross income in section 1 of the Act when it is actually received, upon the issue of the gift cards, or when it is redeemed for goods or when it expires (para 3). Save in the case of refunds, it is obvious that the amounts received in the sale of the gift cards must be included in A's gross income (*ibid*). Thus, the question is not whether the amounts must be included in gross income, but rather when it must be included (*ibid*).

Binns-Ward J ruled that the sale of a gift card, which entitles the bearer of the gift card to redeem the gift card at a later stage for the supply of goods, is not akin to common law sale agreements (para 5). Because, at the time of sale of the gift card, the *merx* is still unidentified, the sale of the gift card cannot constitute a sale agreement in the true sense of the word (*ibid*). It is only when the gift card is later redeemed for goods that a sale agreement is concluded (*ibid*). The gift card is nothing but a card or document, which confirms the bearer's personal right against A for the redemption of the prepayment (*ibid*).

In terms of section 63(2)(b) of the CPA, unless the parties agree otherwise, a gift card expires after three years of the date of issue of the gift card. Thus, where the gift card is not redeemed within three years, it expires and the issuer (A) may retain the prepayment and is released of its obligations in terms of the gift card agreement (para 6).

Section 63(3) of the CPA provides that

> "[a]ny consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services"

Tied with the reading of section 63, section 65(2) of the CPA provides that –

> "(2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier –
>
> (a) must not treat that property as being the property of the supplier;
>
> (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
>
> (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b)."

Essentially, the court in *Geldenhuys v Commissioner for Inland Revenue* (1947 3 SA 256 (C) at 266 and at 269) interpreted the phrase "received by" in the definition of gross income to mean that the amounts must be received by the taxpayer "on his own behalf for his own benefit" or "received by him in such circumstances that he becomes entitled to it" (para 15). However, in *Ochberg v Commissioner for Inland Revenue* (1931 AD 215, 5 SATC 93), the court ruled that it is generally irrelevant whether an amount was received by the taxpayer for her own benefit for it to be included in the taxpayer's gross income (para 16). In the light of the provisions of the CPA, there is no doubt that in this case, the interpretation of "received by" as contemplated in *Geldenhuys* must apply (para 16). In this regard, in *ABC Proprietary Limited Company v CSARS*, A brought forward two arguments. First, because the amounts received for the sale of gift cards were held in a separate account on behalf of the bearer until the gift card is redeemed or until it expires, the amounts are held in trust for the benefit of the bearer and not for the benefit of A (paras 17–18). Second, the effect of the provisions of sections 63 and 65 of the CPA constitutes the money received by A for the gift cards as trust money held on behalf of the bearer until the gift card is redeemed or until it expires (para 31). In respect of the first argument, in our law, it is not sufficient to merely keep the amounts in a separate account (as A did) to hold money in "trust" (para 19). What is required is the existence of a legal context such as a will, agency agreement, attorney-client relationship, or like agreement, which justifies the avoidance of the legal consequence of ordinary *commixtio* (*ibid*). Save for the provisions of the CPA, no legal context exists that requires A to act as guardian or trustee for the money it holds on behalf of the bearer of a gift card (paras 19–20). Therefore, a mere segregation of funds does not create the legal context required to establish a "trust", the latter of which is necessary for the first argument to succeed (para 20).

It is reasonably clear that the purpose of sections 63 and 65 of the CPA is to provide protection to the consumer by propelling the supplier of gift cards to segregate amounts received for gift cards until the gift cards are redeemed for goods or until they expire (para 36). This is a statutory duty imposed by the CPA (*ibid*). The only way to execute this duty, in the case of money, is to keep the money in a separate account as a custodian of that money on behalf of the bearer of the gift card (*ibid*). The effect of sections 63 and 65 of the CPA is to create a

statutory trust, even if it does not comply with the legal context requirement under common law (para 37). The intention of this legal fiction is to protect the bearer of the gift card in instances where the issuing supplier goes bankrupt (para 37). Obviously, the monies received from the sale of gift cards are immediately intermingled with the other monies of the issuing supplier (para 38). This creates a perplexity not easily reconcilable with the common law rules pertaining to trusts (*ibid*). That said, the fact that the transactions can be tracked easily and accurately and the fact that that the issuing supplier segregates the amounts monthly, indicate that the legal fiction created by the CPA is indeed practically implementable (paras 38–39). In doing as directed by the CPA, A received the monies not for its own benefit, but to safeguard the money on behalf of the bearer of the gift card until it is redeemed or until it expires (para 39). Accordingly, it is only when the gift card is redeemed or when it expires that the proceeds of its "sale" accrue to the taxpayer; for it is only then that the taxpayer legally becomes entitled to the proceeds (para 40). Binns-Ward J concluded that it is not the intention of the CPA to defer a taxpayer's tax liability (para 41). However, it is the necessary implication of the CPA that the issuing supplier is not taxed. This is because the amount has not been received by or accrued to the supplier (*ibid*).

4 Commentary

4 1 Classification of the sale of a gift card

Gift cards and vouchers have become essential business tools in modern society. Ascertaining the legal nature of gift cards remains a challenge (Akindemowo "Contract, deposit or e-value? Reconsidering stored value products for a modernized payment framework" 2008 *DePaul Business & Commercial Law Journal* 275). In the main, three arguments exist. These are that (a) gift cards are mere payment methods akin to bank-issued cards; (b) the payment for the gift card is a mere deposit for a future contract of sale; and (c) the gift card agreement constitutes a contract of sale. Each of these arguments will now be examined briefly.

4 1 1 Gift card as mere payment method

Gift cards and payment methods like debit cards, credit cards and promissory notes are only somewhat similar. While a gift card may sometimes be branded with the logo of Visa or Mastercard, the gift card is neither a credit transaction nor a debit transaction (*ibid*). This is so because the merchant does not provide a credit facility, and neither are any funds deposited into the customer's account (*ibid*). A pre-determined value is stored on the card. Similarly, gift cards do not comply with the requirements of the definitions of a bill of exchange (s 2(1) of the Bills of Exchange Act 34 of 1964, particularly the requirement "to pay a sum certain in money"), cheque (ss 1 and 2(1) of the Bills of Exchange Act, particularly the requirements "drawn on a bank" and "to pay a sum certain in money"), or promissory note (ss 1 and 87(1) of the Bills of Exchange Act, particularly the requirement "to pay on demand a sum certain in money"), to qualify as a negotiable instrument (Ramdhin 2016 *LAWSA* Vol 19 2nd ed replacement). Accordingly, a gift card is not akin to a bill of exchange.

4 1 2 Payment of the gift card constitutes a deposit

Section 1 of the Banks Act (94 of 1990) defines a deposit, when used as a noun, as "an amount of money paid by one person to another person subject to an agreement in terms of which an equal amount or part thereof is conditionally or unconditionally returnable". Specifically excluded from the definition for purposes of the Banks Act is a deposit that is paid in terms of a contract of sale that constitutes payment for goods or services to be supplied in future and where the deposit is only repayable upon non-fulfilment of the contract of sale (proviso (i) of the definition of "deposit" in s 1 of the Bank's Act). A deposit is defined as "an amount of money that you pay as the first part of the total payment for something" or "to pay someone an amount of money when you make an agreement with that person to pay for or buy something, that either will be returned to you later, if the agreed arrangement is kept, or that forms part of the total payment" (*Cambridge dictionary* available at https://dictionary.cambridge.org/dictionary/english/deposit accessed on 7 Feb 2020). In the case of a gift card, the consensus between the merchant and the customer is that the bearer of the gift card may exchange the gift card in future for goods or services. The payment for the gift card does not establish a partial payment of the total purchase price. Although the consumer protection measures of the CPA essentially entitles the buyer of the gift card to a refund (s 63(3) of the CPA), the intention of the parties is not that the merchant merely keeps the customer's money as a deposit until the customer requests a refund. Accordingly, a gift card is not akin to a deposit.

4 1 3 Gift card agreement constitutes a contract of sale

Akindemowo argues that, because the parties reach an agreement that the merchant provides the cardholder with a card in exchange for money for the supply of goods or services by the merchant at a future date equal to the monetary value on the card, the payment made for the card is a mere prepayment for the supply of future goods or services (Akindemowo 294). Accordingly, a contract of sale is established (*ibid*). The essential elements of a contract of sale are: a buyer and a seller capable of entering into an agreement; the thing (or the things) that forms the subject matter of the agreement; the price payable in money; and the mutual consent of the parties (Zulman and Dicks *Norman's law of purchase and sale in South Africa* (2017) para 1.2; Glover *Kerr's law of sale and lease* (2014) 3–5; *Johnston v Leal* 1980 3 SA 927 (A) 937 H). There is no doubt that the requirement of buyer and seller capable of entering into an agreement is complied with where the buyer of a gift card enters into an agreement with the merchant to buy the gift card. Further, the requirement of a price payable is complied with when the purchaser expresses the monetary value of the gift card she wishes to purchase. However, the requirement of the *merx* is rather sticky. Paulus states that there can be a valid sale of anything that one may possess or sue for, but there can be no sale of anything that is excluded from commerce by natural law, the law of nations, or the observance of the state (*Dig.* 18.1.34.1 *Paulus 33 ad Ed.* Translation by Watson *The digest of Justinian* (1985); see also Glover 36–37). The thing to be sold can be in existence and identified at the time of agreement (ascertained goods) or not in existence or in existence, but not identified at the time of agreement (unascertained goods) (see Zulman and Dicks para 3.3; Glover 54–59). In the case of the gift card, two arguments can be brought forward. One, the gift card that bears the monetary value constitutes the *merx*. Two, the gift card itself does not constitute the *merx*, but the *merx* is an

unidentified item (or items) that is in existence and which will be identified when the bearer of the gift card exercises her choice. The gift card serves as a pre-payment for goods or services to be supplied later. Either way, the gift card does not constitute a sale of a *merx* that is yet to come into existence or so-called future goods as Akindemowo suggests (For a discussion on future goods, see Zulman and Dicks 3.4; Glover 54–59; *Castle Wine & Brandy Co v Barnard* 149 3 SA 17 (O); *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Bank Co Ltd* 1924 AD 573; *Koenig v Johnston and Co Ltd* 1935 AD 262; *Boesch v Bark and Guttenberg NNO* 1960 1 SA 293 (A)). Both arguments have the same result, namely, that the agreement complies with the requirements to establish a valid contract of sale. In my view, two agreements exist. The one agreement is a contract of sale where the purchaser pays a sum certain in money in exchange for a gift card that has a monetary value. The second is a contract of sale where the bearer of the gift card exchanges the monetary value of the gift card for goods or services to the same intrinsic value stored or printed on the gift card. Because the gift card has a predetermined monetary value, the second agreement is a contract of sale, rather than a contract of exchange (See *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 1 SA 172 (D) 178 and *Hoeksma v Hoeksma* 1990 2 SA 883 (A) at 897). Of course, it can be argued that the second agreement is so intractably linked to the first agreement that the recognition of the second agreement as a separate agreement is superfluous. Who buys a gift card without the intention of redeeming it for goods or services?

Where the two agreements are so intractably linked as to make the distinction discussed above absurd or commercially non-viable, an argument can be brought forward that the accrual is regulated in terms of section 24C(2) of the Act (See *Commissioner for the South African Revenue Service v Big G Restaurants (Pty) Ltd* 2019 3 SA 90 (SCA); *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16).

Section 24C(2) provides:

> "If the income of any taxpayer in any year of assessment includes or consists of an amount received by or accrued to him in terms of any contract and such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of the taxpayer's obligations under such contract, there shall be deducted in the determination of the taxpayer's taxable income for such year such allowance (not exceeding the said amount) in respect of so much of such future expenditure as relates to the said amount."

In other words, in terms of section 24C, the full amount of the gift card accrues to the retailer upon the sale of the gift card. The gift card (agreement) provides that the retailer will tender performance in future. The money received for the gift card will be utilised to finance the performance in the future. Accordingly, the retailer may be entitled to deduct from the amount, a value not exceeding the value of the gift card that reflects the value of the part of the performance that will be rendered in future. This argument is flawed for the following reasons:

(a) It is impossible for the retailer to indicate that the specific money that was received for the gift card will be utilised to render performance in future (see *The Commissioner for the South African Revenue Service v Clicks Retailers (Pty) Ltd* (58/2019) [2019] ZASCA 187 (3 December 2019)).

(b) If it is argued that the money received will be utilised to render performance in future, it is the whole amount that will be utilised as such. This is because gift cards are generally not redeemable in part (*ibid*).

Even if it is found that section 24C finds application, the amount to be deducted remains unclear. *Interpretation note 78* provides an example of how section 24C can find application in the case of gift vouchers, but no clear formula exists as to how the amount to be deducted must be calculated. It is worth noting that the Commissioner in *ABC Proprietary Limited Company v CSARS*, in the revised assessment, relied on the application of section 24C. However, on appeal to the tax court, the Commissioner abandoned this argument.

4 2 Income Tax Act subordinate to the CPA?

In the modern Constitutional regime, "all statutes must be interpreted through the prism of the Bill of Rights" (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) 558. In other words, legislation must be interpreted to advance the spirit, purport, and objects of the Bill of Rights (Du Plessis "Theoretical dis(position) and strategic leitmotivs in constitutional interpretation in South Africa" 2015 *PELJ* 1337). This canon of interpretation cannot be overruled by any other legislation (*ibid*). All legislation is subject to the Constitution, 1996 and specifically the Bill of Rights (*ibid*). It is common knowledge that national legislation, which has been passed by parliament, gazetted and promulgated (so-called original legislation), operate and apply concurrently. In other words, national legislation does not operate in competition with one another and one Act is not inferior to another Act. Also, it is a well-known canon of construction that an enactment does not alter existing law more than is necessary (Du Plessis *The interpretation of statutes* (1986) 69–71; Cockram *Interpretation of statutes* (1983) 45). Thus, where two Acts are inconsistent with each other, in following the constitutional approach, an interpretation that is reconcilable with the spirit, purport, and objects of the Bill of Rights must be followed to reconcile the conflicting Acts. However, where one Act completely contradicts the other, it is justified to assume that the later Act has repealed the earlier one or that the later Act amends the earlier Act to the extent of its inconsistency (*New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367, 400; *Harris v Minister of Interior* 1952 2 SA 428 (AD) 459; Cockram 147; *Ex parte Smit: In re Boedel Smit* 1983 3 SA 438 T 443; Devenish *Interpretation of statutes* (1992) 161; *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 3 SA 317 (SCA)). Importantly, in the absence of an express provision in the later Act, the earlier Act can be altered by the later Act only if it is necessary to do so and not merely because, it is possible or convenient to do so (*S v Barnard* 1971 1 SA 474 (C); *S v Macdonald* 1978 4 SA 200 (T)).

This begs the question whether or not the CPA really is inconsistent with the Income Tax Act, and more specifically the definition of "gross income", so as to conclude, as Binns-Ward J did, that section 63 read with section 65 of the CPA supersede the provisions of the Income Tax Act and that the proceeds of the sale of gift cards do not accrue to the merchant on the date that the gift card is sold.

4 2 1 Scope and application of sections 63 and 65 of the CPA

Van Eeden argues that the CPA has far-reaching consequences in that it not only changes substantive law, but also sets new normative rules of conduct in the consumer market for further "living" reform of substantive law (Van Eeden *A guide to the Consumer Protection Act* (2009) 25; Van Eeden *Consumer protection law in South Africa* (2013) 25).

Section 2(9) of the CPA provides that where a provision in the CPA is inconsistent with a provision in another Act, both Acts must apply concurrently where possible. Where concurrent application is impossible, the provision that provides greater protection to the consumer prevails (s 2(9)(b) of the CPA). On first glance, the definition of "gross income" does not affect the rights of the consumer negatively. The rights embodied in section 63 read with section 65 are rights afforded to the consumer and not to the seller of the gift card. Whether or not the merchant must include the proceeds of the sale of gift cards in its gross income and pay income tax on it, is irrelevant from the consumer's perspective. Whether or not the merchant has accounted for income tax on the proceeds of the sale of the gift card does not remove, hinder, or impart the consumer rights of the consumer. Accordingly, from a consumer rights perspective, the provisions of the Income Tax Act, with reference to "gross income", can run concurrently with sections 63 and 65 of the CPA.

Section 63(3) of the CPA provides that ownership in the consideration given by the consumer remains with the consumer, until the prepaid card has been redeemed in full or until it has expired. It is common knowledge that money is a form of payment. Unless specific notes and coins are applicable – like antique notes and coins – one cannot take "ownership" of money (Van der Merwe "Things" in Joubert *et al* 2001 *LAWSA* vol 27; *Woodhead Plant & Co v Gunn* 1894 11 SC 4; Thomas and Boraine "Ownership of money and the Actio Pauliana: *Commissioner of Customs and Excise v Bank Lisbon International Ltd* 1994 1 SA 205 (N)" 1994 *THRHR* 678–680; Pretorius "The *bona fide* purchaser of a Krugerrand" 2004 *SA Merc LJ* 466). Thus, the only way for the merchant to preserve ownership is to safeguard the exact same notes and coins handed over to it by the consumer (Eiselen "Section 63" in Naudé and Eiselen *Commentary on the Consumer Protection Act* (2014) para 5). Eiselen points out that this is absurd and commercially impossible (*ibid*). This absurdity is exacerbated by the fact that, in an increasingly cashless society where payment by way of bank cards, electronic funds transfer (EFT) and tapping of mobile devices are preferred, the exact coins and notes cannot be identified. Therefore, these payment methods constitute a transfer of personal rights or obligations. Van der Merwe, in the first reissue of Joubert et al *LAWSA*, supports the view that such personal rights constitute property in South African law, but states that they do not constitute things for purposes of ownership (Van der Merwe paras 204; 294–295. See also Pretorius 474). Although section 63 hints towards an intention of the legislator to create a statutory preferent claim in the hands of the customer against the merchant in the case of insolvency or liquidation, the impracticality of the provisions simply does not support this notion sufficiently to infer such an intention on the legislator. Accordingly, I do not support the argument by Binns-Ward J that section 63 prevents the transfer of ownership of the money in the hands of the merchant, until the gift card is redeemed or until it has expired. Even if the argument by Binns-Ward J is correct, in paragraph 4.3 below, I show that the transfer of ownership in money is not a requirement for an amount to be

received by or accrued to a taxpayer for purposes of the definition of "gross income" in section 1 of the Income Tax Act.

In essence, section 65(2)(a) provides that the merchant who receives consideration in exchange for a gift card or voucher or who receives prepayment must not treat the consideration so received as its own property. Eiselen points out that this "duty" imposed on the merchant means that the merchant must keep separate from its own funds the consideration received for a gift card (Eiselen "Section 65" paras 6–9). The CPA does not provide any rules or guidance on how the consideration must be kept separate. As Eiselen correctly points out, how such separation will take place in the ordinary course of a merchant's business is uncertain (*ibid*). Is the merchant required to separate the consideration with each and every transaction, or can it be done at the end of the business day when the cashiers cash up? Is the merchant required to keep a separate bank account for such payments or is it sufficient to show the separate entries in the financial statements? Eiselen argues that, generally, when a consumer buys a gift card, the consumer parts with her money with the intention to transfer the money to the merchant in exchange for the gift card (*ibid*). It can be inferred that the purpose of section 65 is to protect the consumer in the case of insolvency or liquidation of the merchant. However, if the money so received is not kept separate, the administrators of the insolvent entity cannot account for it separately. Separate in this sense means that money received from each purchaser of the gift card must be accounted for separately. What if the merchant merely indicated the separation in financial statements, but the amounts so received are all in the same account? At most, the consumer or bearer of the gift card will have a concurrent claim against the merchant (See Eiselen "Section 65" at para 13). In the present case, the taxpayer merchant separated the amounts by transferring the amounts – once a month – from the business account to an alleged "trust" account. The merchant did not keep record of the consumer's personal details. Accordingly, it is impossible for the merchant to exactly indicate which amount in the "trust" account belongs to which customer. The merchant does not comply with the requirements of section 65, because all the monies received from the various customers are pooled in a single account with no records of what belongs to who. This emphasises the impracticality and commercial unsoundness of section 65.

Because the practical execution of the provisions is commercially impossible, it remains to be seen how the provisions protects the consumer in the case of insolvency or liquidation. In my view, the practically of the provisions in section 65 hinders the changes to the substantive law that Van Eeden argues the CPA brings forth.

4 3 Meaning of "received by or accrued to" with reference to the CPA

The wealth of jurisprudence is clear: For purposes of the definition of "gross income", an amount either must be received by or accrued to a taxpayer for it to be included in her gross income (see *CSARS v Cape Consumers (Pty) Ltd* 1999 4 SA 1213, 61 SATC 91). In addition, the Commissioner may not tax an amount when it has accrued and again when it is received by the taxpayer (see *CIR v Delfos* 1933 AD 242, 6 SATC 92; *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 2 SA 353 (A); *SIR v Silverglen Investments (Pty) Ltd* 1969 1 SA 365 (A); *Isaacs v CIR* 1949 4 SA 561 (A)). Neither the Commissioner nor the taxpayer may elect, when an amount has accrued to the taxpayer, that the amount must be

assessed in the year of its receipt (*SIR v Silverglen Investments (Pty) Ltd* 390). It is the general practice of SARS to assess an amount in the year of assessment when it has accrued to the taxpayer (De Koker *et al Silke on South African income tax* (2020) para 2.3). Neither terms are defined in the Act.

4 3 1 "Received by"

A mere physical receipt of money or payment in kind does not satisfy "received by" as contemplated in the definition of "gross income" (De Koker *et al* para 2.5). In *Geldenhuys v CIR* (1947 3 SA 256 (C)), the court ruled that "received by" in relation to the taxpayer means that the taxpayer received the money for his or her own benefit. In this case, the taxpayer was the usufructuary of a flock of sheep. With consent of the *bare dominium* holders, she sold the sheep and received the proceeds of the sale. However, because the sheep did not belong to her, the court held that the proceeds belonged to the *bare dominium* holders and not to the taxpayer recipient. Similarly, in *CIR v Genn & Co (Pty) Ltd* (1995 3 SA 293 (A)), the court ruled that the mere obtaining of physical control over money does not constitute necessarily a receipt for tax purposes. So, for example, money received by a borrower is subject to the concomitant obligation to repay the loan. Thus, taking possession of the borrowed money is not a receipt for tax purposes. Yet, in *Ochberg v CIR* (1931 AD 215, 5 SATC 93), the then Appellate Division ruled that it is irrelevant for purposes of "received by" in terms of section 7(1) of the then Income Tax Act of 1925 whether or not the taxpayer gained any benefit from the receipt. The presence or absence of a benefit when the taxpayer takes possession of the money cannot be used as a measure to determine if an amount was received by a taxpayer (93).

In the Zimbabwean case of *COT v G* (1981 4 SA 167 (ZA)), the court ruled that a person who acquires money by way of a misappropriation of funds did not receive such funds for her own benefit, because the money was never given to her with the intention that she can do with it as she pleased. In contrast, in *CIR v Delogoa Bay Cigarette Co Ltd* (1918 TPD 391), Bristow J ruled that the legality of the receipt is irrelevant. The mere fact that the money was obtained illegally, does not rob the receipt of the legal result, and subsequently, its taxability. This reasoning was confirmed in *MP Finance Group CC (in liquidation) v CSARS* (69 SATC 141 (SCA)). In *ITC 1624* (59 SATC 373), the court ruled that a taxpayer who fraudulently or negligently overcharged his customers must include in its gross income the entire amount received from the customers, because it received the money with the intention to receive it as income in the course of its business (380).

In *ITC 1346* (44 SATC 31), in terms of the taxpayer's employment contract, if he resigned within six months after completion of his research leave, the employer may require him to refund the whole or part of his salary he had received while on leave. After the taxpayer resigned after completion of his leave, the employer invoked its rights to claim a refund of the salary it has paid to the taxpayer during the leave period. Schock J ruled that the contingent liability to repay the salary did not exclude the amount actually received by the taxpayer from his gross income (33). In *Brookes Lemos Limited v CIR* (1947 2 SA 976 (A)) and in *Greases (SA) Ltd v CIR* (1951 3 SA 518 (A)) it was ruled that, once the taxpayer received an amount as his own during a year of assessment, the fact that the amount may later have to be refunded does not affect the fact that the taxpayer received the amounts for income tax purposes. Similarly, in the present

case, when the gift card is sold, A must include the proceeds of the sale in its gross income as an amount "received" by it. Later, when the gift card is exchanged for goods or services, A does not include the value of the gift card in its gross income again, because it has been taxed already. If A must refund the value of the gift card to the bearer, the refund qualifies as an allowable deduction in terms of section 11(a) of the Act.

Yet, in *CIR v Cape Consumers (Pty) Ltd* (1999 4 SA 1213 (C)), the court ruled that amounts received by a buy-aid organisation and which were separated into a "buyers' reserve fund" were not received for the organisation's own benefit. This is so because the articles of association clearly stipulate that amounts received by the organisation are received for the benefit of the buyers. The facts in *Cape Consumers* are clearly distinguishable from the facts at hand. In *Cape Consumers*, from the beginning, the intention of the association was not to receive the amounts for its own benefit. In the current case, A has the intention to receive the money for its own benefit, albeit supposedly suspended by the provisions of section 65 of the CPA. In addition, as indicated above, because of the impracticality and commercially unsoundness of the provisions in section 65, it is unlikely that the intention to receive the money for its own benefit is suspended until the gift card is exchanged for goods or services, or until it has expired. Furthermore, as Eiselen points out, it is generally the case that the purchaser of the gift card intends to part with her money in favour of the merchant so that the merchant can do with the money as it pleases. Thus, in the absence of a specific agreement between the customer and merchant that the merchant must safeguard the customer's money until the gift card is exchanged for goods or services, or until it has expired, an amount received in exchange for a gift card is an amount received for the benefit of the merchant.

4 3 2 "Accrued to"

Because the proceeds of the sale of the gift cards constitute a receipt for income tax purposes, it is not necessary to determine if the amount has accrued to the taxpayer. However, since Binns-Ward J ruled that the amount has neither been received by A nor has it accrued to A, I find it necessary to also explain why, in my view, the amounts also accrued to A.

In *Lategan v CIR* (1926 CPD 203, 2 SATC 16), Watermeyer J ruled that "accrued to" means an amount that the taxpayer has become entitled to (209). This entitlement signifies that the moment an amount becomes unconditionally and uncontingently due to the taxpayer, it must be included in gross income (see *ITC 1805* 68 SATC 110). In *Ochberg*, Watermeyer J ruled that where the right to claim future instalments is conditional or subject to performance of certain obligations or the fulfilment of specific terms, there can be no accrual under the Act, until that obligations have been performed or the conditions have been fulfilled. De Koker *et al* argue that conditions to be fulfilled may relate to either the taxpayer's entitlement or to the quantum of the amount (para 2.7). Thus, where the amount payable is in dispute, accrual is suspended, until such dispute is settled and the amount payable is agreed upon. It is important to note that the conditions and contingencies referred to in *Lategan* (which was later confirmed by *CIR v People's Stores*) imply true conditions. Christie and Bradfield correctly point out that "conditions" in the law of contract are riddled with semantics (Christie and Bradfield *Christie's The law of contracts in South Africa* (2016) 155–156). It is a well-known fact that most agreements contain headings titled

"conditions of sale". In the main, these paragraphs or clauses in the agreement contain mere terms of the agreement. A true condition, as alluded to by Chistie and Bradfield, is different from the ordinary terms of an agreement. The distinction requires a construction of the particulars and sophistications of the agreement and/or the way it was drafted. A true condition, whether suspensive or resolutive, the operation of the whole contract, or part thereof, and its consequences, depend upon an uncertain future event (See *R v Katz* 1959 3 SA 408 (C) 417E; *Design and Planning Services v Kruger* 1974 1 SA 689 (T) 695C; *Southern Era Resources Ltd v Farndell NO* 2010 4 SA 200 (SCA) para 11; Christie and Bradfield 155–157; 164–165). The contract becomes enforceable upon fulfilment of the condition.

In the case of gift cards, two agreements of sale come into being. The argument that a single agreement for the sale of goods or services is entered into and that the performance is suspended until the gift card is redeemed for goods and services does not resonate with the principles of the law of contract. Similarly, the provisions in sections 63 and 65 of the CPA do not suspend the performance in terms of the agreement, until the fulfilment of an uncertain future event. On that basis alone, an amount received for the sale of a gift card accrues to the merchant upon conclusion of the agreement.

Transfer of ownership is not a requirement for an amount to accrue to the taxpayer (See *MP Finance v CSARS; CSARS v Brummeria Renaissance (Pty) Ltd* 2007 6 SA 601 (SCA)). While money creates a personal right in South African law, money does not constitute a "thing" for the purpose of ownership (Van der Merwe 204; 294–295). Thus, upon conclusion of the sale of the gift card, the merchant becomes entitled to the money so received, and the holder of the gift card has a mere personal right against the merchant for good and services when the holder enters into the second agreement with the merchant to exchange the intrinsic value of the gift card for goods and services. Note that I do not argue that the customer who acquired the gift card has a personal right against the merchant for the value of the gift card. This is so because any bearer of the gift card is entitled to enter into an agreement with the merchant for the exchange of the gift card for goods and services. On this premise, upon conclusion of the sale of the gift card, sections 63 and 65 do not limit in any way or prevent the accrual of the money in the hands of the merchant.

5 Conclusion

Interestingly, Du Plessis postulates that in the exegesis of law, it is impossible for the interpreter to set aside her own theoretical position (Du Plessis 2015 *PELJ* 1339). This theoretical position is a combination of interacting forces, prejudice, intuitive perception, reasoned choice, and awareness (*ibid*). Could it be that Binns-Ward J was overwhelmed with the euphoria of consumer rights in CPA?

The fact remains that sections 63 and 65 of the CPA were drafted poorly, resulting in the impracticality of the provisions. Irrespective of the impracticality, these provisions simply do not affect the substantive law, and specifically the Income Tax Act, to the extent that the CPA overrides the provisions of the Income Tax Act. If it was the intention of the legislator to protect the consumer in the case of insolvency or liquidation of the merchant, the legislator should have created a statutory preferent claim in favour of the consumer. Even so, such

consumer protection measures – in the form of a statutory preferent claim – do not take away the fact that an amount was received by the merchant upon conclusion of a sale of a gift card for the merchant's benefit. Depositing money in a separate account does not protect the money from the merchant's creditors. Similarly, the mere separation of funds does not create a "trust" account free from the merchant's creditors and it does not constitute a "trust" account for the benefit of another. Unless the proceeds of the sale of the gift card can be linked to the specific purchaser and the merchant has complete records to show what money belongs to who, a statutory trust, as alluded to by Binn-Ward J, has not been created. Thus, the argument that the separation of the proceeds of the sale of gift cards constitutes a "trust" account and that the proceeds so received are not received for the benefit of the merchant, but for the benefit of the consumer, is flawed. I am convinced that this judgment is likely to be overturned on appeal.

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EFFECT OF SEQUESTRATION ON THE PROPERTY OF THE SOLVENT SPOUSE: SECTION 21 OF THE INSOLVENCY ACT

***Davies v Van Den Heever NO* (16865/2017) [2019] ZAGPJHC 59 (1 March 2019)**

OPSOMMING

Gevolge van sekwestrasie met betrekking tot die eiendom van die solvente gade: Artikel 21 van die Insolvensiewet

Ingevolge artikel 21 van die Insolvensiewet 24 of 1936 vestig die eiendom van die solvente gade na sekwestrasie van die insolvente gade se boedel in laasgenoemde se kurator. Die onus rus dan op die solvente gade om te bewys dat die betrokke eiendom aan haar behoort. In *Davies v Van Den Heever*, het die kurator geweier om bepaalde eiendom van die solvente gade vry te gee. Gevolglik het sy die hof genader. Die hof het beslis dat die betrokke eiendom vrygegee moet word op grond daarvan dat sy dit gedurende haar huwelik, kragtens 'n titel wat regsgeldig teenoor die insolvent se skuldeisers is, verkry het. Die hof het beslis dat die transaksie, ingevolge waarvan sy die eiendom verkry het, 'n ware transaksie was wat nie met die doel om skuldeisers te bedrieg, aangegaan was nie. Gevolglik kon dit 'n geldige titel verleen.

Die aansoek in *Davies* is 'n ongelukkige gevolg van die Konstitusionele hof se uitspraak in *Harksen v Lane*, dat artikel 21 nie ongrondwetlik is nie. In *Harksen* het die hof die belange van skuldeisers oorbeklemtoon. Die internasionale tendens is om van die tradisionele doelwit van die verbruikersinsolvensiereg, om die maksimum voordeel vir skuldeisers te bewerkstellig, af te wyk. Volgens internasionale riglyne moet beleidsvormers 'n gebalanseerde benadering volg en toesien dat skuldeisers se belange nie bo dié van ander partye, wat by insolvensie-aangeleenthede betrokke mag wees, geag word nie.

Dit word aan die hand gedoen dat daar ander, minder indringende, wyses is om die doelwitte van artikel 21 te bereik. Die voorstelle van die Regskommissie ter wysiging van die wetsbepalings met betrekking tot vernietigbare vervreemdings dui op 'n gebalanseerde benadering en verleen opsigself voldoende beskerming aan skuldeisers.